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No. 81-37

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

JOHN PAUL MINARIK,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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September 25, 1981

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner, John Paul Minarik, files this Supplemental Brief pursuant to Supreme Court Rule 22.6 for the purpose of drawing to the attention of this Court the decision of the United States Court of Appeals for the Sixth Circuit in Lonberger v. Jago, 651 F.2d 447 (6th Cir., June 11, 1981), which had not been published at the time petitioner filed his Petition for Writ of Certiorari.

In Lonberger v. Jago, the Sixth Circuit (Lively, Brown and Peck, JJ.) reversed a District Court's denial of habeas corpus and remanded with instructions to grant the writ unless Ohio proceeded to retry the petitioner. The Sixth Circuit in an earlier opinion, 635 F.2d 1189, had applied this Court's decision in Henderson v. Morgan, 426 U.S.

637, 645, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976), to invalidate a guilty plea to a charge of attempted murder which had been accepted by an Ohio trial court in 1972. The plea colloquy failed to show that the trial court had informed the defendant of the nature of the crime to which he was pleading and the State had failed to demonstrate at a subsequent hearing conducted in Ohio that Lonberger had such knowledge from other sources. The Sixth Circuit wrote:

> In Henderson v. Morgan... the Supreme Court, holding that a defendant must receive "real notice of the charges against him," observed:
>
> > A plea may be involuntary either because the accused does not understand the nature of the constitutional protection that he is waiving or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of

> guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.
>
> In view of the trial judge's failure to apprise the petitioner at any time that he was pleading guilty to attempted murder, and it nowhere affirmatively appearing in the transcript that the petitioner was aware that his plea was to the charge of attempted murder, we are compelled to conclude that the transcript on its face is inadequate to show that the defendant understood the charge to which he was pleading.
>
> 635 F.2d at 1194.

The State of Ohio petitioned this Court for certiorari and this Court entered an order, 101 S. Ct. 1967, directing the Sixth Circuit to reconsider its opinion in light of Sumner v. Mata, 449 U.S. ___, 101 S. Ct. 764 (1981)(federal habeas court must state reasons for rejecting findings of fact made by state courts).

On reconsideration, the Sixth Circuit adhered to its earlier result and justified its rejection of the findings of the Ohio court:

> The transcript of Lonberger's 1972 plea is inadequate to show that Lonberger was aware that he was pleading guilty to a charge of attempted murder***
>
> In the face of this inadequate transcript, the state had to demonstrate clearly and convincingly that the validity of the plea.... The state did not meet this burden.
>
> 651 F.2d at 449.

The Sixth Circuit's interpretation of Henderson v. Morgan is that the State, to satisfy its burden under Boykin v. Alabama of affirmatively demonstrating that a plea of guilty was knowingly and intelligently entered, must either produce a transcript of the entry of the plea showing that the defendant was informed of the

material elements of the offense or must demonstrate in a post-plea hearing that the plea was nevertheless entered with a complete "understanding of the charge...." Henderson v. Morgan, 426 U.S. at 645.

This approach, which, petitioner suggests, is what this Court intended in its decision in Henderson v. Morgan, stands in stark contrast to that of the Supreme Court of Pennsylvania in this case.

While Pennsylvania acknowledges the inadequacies of the plea colloquy, it sees no reason to require the State to prove that the plea was nevertheless valid at a post-plea evidentiary hearing and chooses instead to rely on a "presumption" that defense counsel explained the elements of the crime to which petitioner here pled guilty.

Petitioner suggests that the approach of the Supreme Court of Pennsylvania clearly fails to satisfy the federal constitutional standards for determining the validity of guilty pleas.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, Robert Lincoln Potter, hereby certify that three true and correct copies of the foregoing "Petitioner's Supplemental Brief" were served by U.S. Mail, first-class, postage prepaid, to Robert L. Eberhardt, Esquire, Deputy District Attorney, 301 Courthouse, Pittsburgh, Pennsylvania 15219 this ____ day of September, 1981.

Robert Lincoln Potter